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07-CV-01121-CMP

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

C07-1121C

LUIS TORRES, Individually and on behalf of
all others similarly situated,

Plaintiff,

v.

MICROSOFT CORPORATION, a Washington
Corporation,

Defendant.

Case No.

CLASS ACTION COMPLAINT FOR:

1. BREACH OF CONTRACT;
2. VIOLATION OF CONSUMER
PROTECTION ACT (RCW 19.86);
AND
3. NEGLIGENCE

JURY TRIAL DEMANDED

SUMMARY OF CLAIMS

1. This is a class action against Microsoft Corporation for Breach of Contract, violation of the Washington Consumer Protection Act ("CPA") (RCW 19.86) and, alternatively, Negligence. Plaintiff brings this action on behalf of himself and all other persons who had Xbox game discs, Compact Discs ("CDs") or Digital Video Discs ("DVDs") damaged by their Microsoft Xbox 360 gaming consoles.

THE PARTIES

2. Plaintiff Luis Torres is an individual resident of California. Plaintiff is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff brings this action

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1 individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf
 2 of the class specified herein.

3 3. Defendant Microsoft is a corporation organized under the laws of the State of
 4 Washington, with its principal place of business at One Microsoft Way, Redmond, WA 98052-
 5 6399. Microsoft is the manufacturer of the Xbox 360 gaming console ("Xbox 360") and also
 6 provides support for the Xbox 360 through the <http://www.xbox.com> website. Purchasers of the
 7 Xbox 360 presumptively include citizens of every state in the United States.
 8

9 JURISDICTION AND VENUE

10 4. This Court has original jurisdiction over this action pursuant to 28 U.S.C. §
 11 1332(d)(2) in that it is a class action filed under rule 23 of the Federal Rules of Civil Procedure,
 12 the matter in controversy, as aggregated pursuant to 28 U.S.C. §1332(d)(6), exceeds the sum of
 13 \$5,000,000 exclusive of interest and costs, and a substantial number of members of the class of
 14 plaintiffs are citizens of a state different from Microsoft
 15

16 5. Venue is proper in the Western District of Washington pursuant to 28 U.S.C. §
 17 1391(a) and 28 U.S.C. § 1391(c) in that: (1) Microsoft is a Washington Corporation with its
 18 principal place of business in the Western District of Washington; and (2) Microsoft is subject to
 19 personal jurisdiction in the State of Washington.
 20

21 CLASS ACTION ALLEGATIONS

22 6. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil
 23 Procedure 23(a), (b)(2), and (b)(3) on behalf of all persons who had game discs, Compact Discs
 24 ("CDs") or Digital Video Discs ("DVDs") damaged by their Microsoft Xbox 360 gaming
 25 consoles. Excluded from the Class are officers and directors of the Company, members of their
 26

1 immediate families and each of their legal representatives, heirs, successors or assigns and any
2 entity in which Microsoft has or has had a controlling interest.

3 7. For purposes of this action, "damage" to game discs, CDs or DVDs means an
4 impairment in the normal function or operation of the discs.

5 8. This action is properly maintainable as a class action because:

6 a. The members of the Class for whose benefit this action is brought are
7 dispersed throughout the United States and are so numerous that joinder of all Class members is
8 impracticable. While the exact number of Class members is unknown to Plaintiff at this time
9 and can only be ascertained through appropriate discovery, Plaintiff believes that Class members
10 number in at least the thousands. Members of the Class may be identified from records
11 maintained by Microsoft and may be notified of the pendency of this action by mail, using a
12 form of notice similar to that customarily used in class actions;
13

14 b. Plaintiff's claims are typical of those of the Class as all members of the
15 Class are similarly affected by Microsoft's actionable conduct as alleged herein;
16

17 c. Plaintiff will fairly and adequately protect the interests of the Class and
18 has retained counsel competent and experienced in class action litigation in the U.S. District
19 Courts. Plaintiff has no interests antagonistic to, or in conflict with, the Class that Plaintiff seeks
20 to represent;
21

22 d. A class action is superior to other available methods for the fair and
23 efficient adjudication of the claims asserted herein, because joinder of all members is
24 impracticable. Furthermore, because the damages suffered by individual members of the Class
25 may be relatively small, the expense and burden of individual litigation make it virtually
26

1 impossible for Class members to redress the wrongs done to them. The likelihood of individual
2 Class members prosecuting separate claims is remote;

3 e. Microsoft has acted or refused to act on grounds generally applicable to
4 the class, thereby making appropriate final injunctive relief with respect to the class a whole;

5 f. Plaintiff anticipates no difficulties in the management of this action as a
6 class action; and

7 g. The questions of law and fact common to the members of the Class
8 predominate over any questions affecting individual members of the Class. Among the questions
9 of law and fact common to the Class are:

- 10
11 i. the pervasiveness of Xbox 360s damaging game discs, CDs and
12 DVDs of class members thereby rendering them unusable, and the
13 circumstances whereby Xbox 360s damage game discs, CDs and
14 DVDs;
15
16 ii. the existence of any agreements between Microsoft and the Class
17 applicable to the claims asserted in this action;
18
19 iii. the construction of any such agreement between Microsoft and the
20 Class;
21
22 iv. Microsoft's acts and/or omissions as alleged herein;
23
24 v. whether Microsoft has breached its agreement with the Class;
25
26 vi. whether Microsoft has taken adequate measures to prevent damage
to game discs, CDs and DVDs placed in Xbox 360s;

- vii. whether Microsoft has taken adequate measures to compensate Class members who have had game discs, CDs and DVDs damaged by their Xbox 360s;
- viii. the propensity and/or likelihood of Xbox 360s to damage game discs, CDs and DVDs when placed in Xbox 360s
- ix. whether Microsoft's marketing and sales of Xbox 360s which can damage game discs, CDs and DVDs was and is an "unfair or deceptive act or practice" under Washington's CPA;
- x. whether Microsoft's marketing and sales of Xbox 360s which can damage game discs, CDs and DVDs impacted the "public interest" under Washington's CPA;
- xi. if no contract exists between Microsoft and the Class, whether Microsoft was negligent in selling Xbox 360s which can damage game discs, CDs and DVDs; and
- xii. to what extent the members of the Class have sustained damages and the proper measure of damages.

SUBSTANTIVE ALLEGATIONS COMMON TO ALL COUNTS

1. Microsoft's Xbox 360 Gaming Console

9. The Xbox 360 is Microsoft's latest video game console and was the first of the most advanced generation of game consoles. The Xbox 360 competes with Sony's PlayStation 3 and Nintendo's Wii. There are now three different configurations of the Xbox 360--the Xbox 360 Elite System, the Xbox 360 Premium Package and the Xbox 360 Core System. The suggested retail price for the Xbox 360 Elite System is \$479.99, for the Xbox 360 Premium

1 Package the suggested retail price is \$399.99 while the suggested retail price for the Xbox 360
2 Core System is \$299.99. According to Microsoft, as of the end of June 2007, approximately
3 11.6 million Xbox 360 consoles had been sold.

4 10. All Xbox 360s include a built in DVD drive which is used to play game discs
5 licensed by Microsoft for the Xbox 360 and select backward-compatible games made for the
6 original Xbox system.

7
8 11. Games for the Xbox 360 retail at various price points between \$29.99 and \$59.99
9 with almost all new titles being initially priced at \$59.99. Although all games for the Xbox 360
10 are licensed by Microsoft, the games are published by many different companies in addition to
11 Microsoft itself. On information and belief, Microsoft itself is not the largest single publisher of
12 Xbox games.

13
14 12. In addition to games, the Xbox 360 DVD drive can also play a range of optical
15 media such as audio CDs and DVDs. Retail prices for CDs and DVDs range in price depending
16 on a variety of factors.

17 13. Since the introduction of the Xbox 360, Microsoft has received multiple
18 complaints that the DVD drive in the Xbox 360 scratches game discs and optical media
19 preventing the disc from functioning properly and, in many cases, scratching the discs so
20 severely as to render them unusable. Despite these complaints, Microsoft has publicly denied the
21 problem and has claimed that the discs were being damaged due to movement of the Xbox 360
22 while the discs were being played.

23
24 14. Microsoft has refused to recall the Xbox 360 to repair the problem with the DVD
25 drive and, with limited exceptions, has refused to provide compensation to class members whose
26 discs were damaged by the Xbox 360 DVD drive.

1 15. On or about April 2007, Microsoft began a limited disc replacement program (the
2 “disc replacement program”) wherein it offered to replace damaged game discs. The disc
3 replacement program is however, limited to “games where Microsoft is the publisher.”
4 According to Microsoft’s Xbox.com website, as of July 17, 2007, only the following games are
5 available for disc replacement:
6

- 7 * Crackdown™
- 8 * Fuzion Frenzy 2
- 9 * Gears Of War®
- 10 * Halo® 2
- 11 * Kameo™: Elements of Power™
- 12 * Ninety Nine Nights™
- 13 * Perfect Dark Zero™
- 14 * Project Gotham Racing® 3
- 15 * Viva Piñata™
- 16 * Xbox Live® Arcade Unplugged Vol. 1

17
18 16. The disc replacement program does not provide for replacement without charge
19 for damaged discs; rather, Microsoft charges \$20.00 to U.S. customers for disc replacement and
20 the replacement consists of “the game disc only, without case or game documents.”
21

22 17. Since the cost to press and ship a replacement game disc is significantly less than
23 a dollar, Microsoft is deriving a profit of \$19.00 or more on each disc it replaces under its disc
24 replacement program.

25 18. The disc replacement program provides no relief to those users of Xbox 360s
26 whose games discs were damaged by the Xbox 360 but are not available for disc replacement.

1 Nor does the disc replacement program provide any relief to those Xbox 360 users whose CDs
2 and DVDs were damaged by the Xbox 360.

3 19. On or about February 2006, plaintiff purchased an Xbox 360 within California
4 state. On or about March 2006, plaintiff purchased three Xbox 360 games—"Call of Duty II",
5 "2K6 Madden NFL", and "2K Sports Baseball 2006." Those games were then scratched by the
6 Xbox 360 through no fault of the plaintiff. The scratches on plaintiff's game discs cause the
7 plaintiff's Xbox 360 to freeze and prevent individual profiles from being saved when using the
8 game discs. Plaintiff, out of his own time and efforts, was able to replace two of the three games
9 scratched by the Xbox 360; however, Microsoft has refused to replace or reimburse plaintiff for
10 the purchase price of one of the three games scratched by the Xbox 360.
11

12 **FIRST CAUSE OF ACTION**

13 **(BREACH OF CONTRACT)**

14 20. Plaintiff realleges the preceding paragraphs as if set forth here.

15 21. Defendant has an Agreement with the Class known as the "Product Warranty:
16 Xbox 360 Video Game and Entertainment System" ("Product Warranty"). The Product
17 Warranty provides:
18

19 **One Year Express Warranty on Console.** Subject to the terms
20 and conditions of this Limited Warranty, Microsoft warrants to you
21 only (the original retail purchaser) that, during the Warranty Period
22 and under normal use and service, the Xbox® Console will
23 substantially conform with the printed user instruction materials
24 packaged with the Console.

25 • **Implied Warranty.** You may also have an implied warranty
26 and/or condition under the laws of some jurisdictions, which is
hereby limited to the duration of the Warranty Period. Some
jurisdictions do not allow limitations on how long an implied
warranty or condition lasts, so the foregoing limitation may not
apply to you.

1
2 22. The Product Warranty further provides:

3 This Limited Warranty does not cover your data, *any separate*
4 *software or Xbox games* whether or not packaged or included with
5 the Xbox Product, or any accessories or peripheral devices that are
6 not manufactured by or for Microsoft. (Emphasis added)

7 23. The Product Warranty further provides that, "If you acquired the Xbox Product in
8 the United States, the laws of the State of Washington, U.S.A., will apply to this Limited
9 Warranty."

10 24. While the Product Warranty seeks to limit Microsoft's liability, disclaim any
11 warranties and limit the Class's remedies, these limitations and disclaimers are unenforceable
12 under Washington law because they are procedurally unconscionable in that the limitations and
13 disclaimers are not specifically negotiated between defendant and each member of the Class;

14 25. Further, the limitations and disclaimers contained in the Product Warranty are
15 unenforceable under Washington law because they are substantially unconscionable in that the
16 limited remedy provided to the Class under the Product Warranty fails of its essential purpose
17 because it deprives the Class of the substantive value of its bargain due to an undiscoverable
18 defect.

19 26. Microsoft's conduct in selling and marketing Xbox 360s with DVD drives that
20 damage game discs, DVDs and CDs along with Microsoft's failure to disclose to the Class the
21 existence of the defect in the DVD drives and Microsoft's failure to repair or replace all Xbox
22 360s with defective DVD drives is a breach of the implied terms of the Product Warranty as well
23 as Microsoft's obligation of good faith and fair dealing.
24
25
26

1 27. As a direct and proximate result of Microsoft's breach, plaintiff and the Class
2 have been damaged in an amount to be determined at trial but in excess of an aggregated amount
3 of \$5,000,000.

4 28. Plaintiff and the Class are also entitled to declaratory and injunctive relief
5 requiring Microsoft to repair or replace all Xbox 360s DVD drives which have damaged or
6 threaten to damage discs inserted in them.

7
8 **SECOND CAUSE OF ACTION**

9 **(VIOLATION OF WASHINGTON CONSUMER PROTECTION ACT)**

10 **(RCW 19.86)**

11 29. Plaintiff realleges the preceding paragraphs as if set forth fully here.

12 30. As described above, the Product Warranty provides that it shall be governed by
13 Washington law. RCW 19.86.090 provides a private right of action to any person injured in his
14 property by an "unfair or deceptive act or practice."

15 31. Microsoft's marketing and sale of Xbox 360s knowing the DVD drives are
16 defective and their failure to disclose to the Class that the Xbox 360 may cause damage to the
17 Class's property violates the Washington Consumer Protection Act because: 1) it was an unfair
18 or deceptive act or practice; 2) committed in the course of Microsoft's business; 3) with a public
19 interest impact (on information and belief Microsoft's actions and inactions affected at least
20 hundreds of thousands of consumers and has the potential to affect millions of consumers);
21 which has caused 4) injury to plaintiff's property and the similar property of the plaintiff class.

22 32. Pursuant to RCW 19.86.090, plaintiff seeks damages on behalf of himself and
23 each class member for their actual damages sustained as a result of defendant's unfair and
24
25
26

1 deceptive act in an amount to be determined at trial but not less than \$5,000,000 as well as the
2 costs of this suit and reasonable attorneys' fees.

3 33. Further, pursuant to RCW 19.86.090, plaintiff seeks treble damages on behalf of
4 himself and each class member for their actual damages sustained as a result of defendant's
5 unfair and deceptive act in an amount to be determined at trial but not less than \$15,000,000.
6

7 **THIRD CAUSE OF ACTION**

8 **(ALTERNATIVE CAUSE OF ACTION)**

9 **(NEGLIGENCE)**

10 34. Plaintiff realleges the preceding paragraphs as if set forth fully here.

11 35. If Microsoft contends that there is no agreement with the Class, Microsoft is liable
12 to Plaintiff and the Class for negligence in selling and marketing the Xbox 360 with a defective
13 DVD drive.
14

15 36. Microsoft has a duty to refrain from selling and marketing the Xbox 360 with a
16 defective DVD drive that can cause damage to the Class's property and violated that duty
17 causing damage to Plaintiff and the Class in an amount to be determined at trial but not less than
18 \$5,000,000.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff, individually and on behalf of all those similarly situated, prays
21 for judgment against defendant as follows:
22

23 Certifying this action as a class action;

- 24 i. Declaring that Microsoft's conduct in selling and marketing Xbox 360s with
25 DVD drives that have damaged and will damage game discs, DVDs and CDs
26 along with Microsoft's failure to disclose to the Class the existence of the defect

1 in the DVD drives and Microsoft's failure to repair or replace all Xbox 360s with
2 defective DVD drives was a breach of contract and of Microsoft's implied duty of
3 good faith and fair dealing;

4 ii. Awarding Plaintiff and the Class damages for Microsoft's breach of contract in an
5 amount to be determined at trial but not less than an aggregate amount in excess
6 of \$5,000,000;

7
8 iii. Declaring that defendant's conduct violates the CPA and awarding plaintiff and
9 the class restitution and damages for such violation;

10 iv. Awarding Plaintiff and the Class damages for defendant's negligent act in an
11 amount to be determined at trial but not less than an aggregate amount in excess
12 of \$5,000,000;

13
14 v. Awarding counsel for Plaintiff and the Class reasonable attorneys' fees and costs;
15 and

16 vi. Granting such other and further relief that this Court may deem just and proper.

17 DATED this 18th day of July 2007.

18
19 KELLER ROHRBACK L.L.P.

20
21 By Amy Williams-Derry

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